

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:)	
)	
LISA DELGATO-MISSAGHI,)	CASE NO. 01-34774 (ASD)
)	
DEBTOR.)	CHAPTER 7

KAMY MISSAGHI,)	
)	
PLAINTIFF,)	
)	
vs.)	ADV. PRO. NO. 01-3147
)	
LISA DELGATO-MISSAGHI,)	
)	
DEFENDANT.)	

**MEMORANDUM AND ORDER SCHEDULING FURTHER PROCEEDINGS ON
TRIAL OF COMPLAINT AND PLAINTIFF’S ORAL MOTION FOR OTHER RELIEF**

On October 1, 2001, Lisa Delgato-Missaghi (hereafter, the “Debtor”) commenced in this Court a voluntary Chapter 7 bankruptcy case through the filing of a petition pursuant to 11 U.S.C. § 301. On December 10, 2001, Kamy Missaghi (hereafter, the “Plaintiff”) commenced the instant adversary proceeding against the Debtor through the filing of a Complaint to Determine Dischargeability of Debts (hereafter, the “Complaint”). On June 26, 2002, the Debtor filed her pro se Appearance, Doc. I. D. No. 14, and an Answer to the Complaint (hereafter, the “Answer”) , Doc. I. D. No. 13, denying “all the allegations of the plaintiff, Kamy Missaghi’s complaint”.

The adversary proceeding came on for trial before this Court as scheduled on February 10, 2003, at 10:00 A.M. (hereafter, the “Trial”) at which time the Plaintiff appeared and the Debtor failed to appear. At the Trial, the Plaintiff, *inter alia*, noted the Defendant’s

failure to appear, and requested entry of a judgment.¹ In addition, the Plaintiff offered copies of twelve (12) pre-marked exhibits, including certain pages of a “Separation Agreement”, Exhibit 11, which were admitted into evidence as full exhibits. The Court took the matter under advisement indicating, *inter alia*, it would enter a Judgment, to the extent appropriate, limited to the relief actually sought in the Complaint.

At the outset, the Court notes that in light of the Debtor’s pro se Appearance, and particularly her Answer, her failure to appear at the Trial, standing alone, will not justify entry of a default under Fed. R. Civ. P. 55(a), applicable pursuant to Fed. R. Bankr. P. 7055(a)(providing for entry of a default “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend”). This Court aligns itself with the view of the majority of courts which have addressed this issue that once a party has answered a complaint, or has otherwise defended, that parties subsequent conduct of failing to appear at trial is not a subsequent failure to “otherwise defend” so as to justify the entry of a default under Rule 55(a). See 10 Moore’s Federal Practice, ¶ 55.10[2][b] (3rd ed. 1999).

The Court now turns to the relief sought in the Complaint which is not a model of clarity. It references “divorce proceedings in Missaghi v. Missaghi FA 96 0133087”, Complaint at ¶ 4, and cites to “11 U.S.C. section 523(a)(5)”, Id. at ¶ a, and, therefore, raises, *inter alia*, the issue of the dischargeability - under the standards of Bankruptcy Code Section 523(a)(5) - of an alleged debt created by a state court divorce proceeding. Section

¹At the Trial the Court insisted that the Plaintiff focus on the relief requested within the four corners of the Complaint. The Plaintiff, however, stated he was appearing for other reasons. See footnote 8, *supra*.

523(a)(5) provides as follows:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

(5) to a spouse, former spouse, or child of the debtor, *for alimony to, maintenance for, or support* of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . but not to the extent that--

* * * *

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is *actually in the nature of alimony, maintenance, or support*;

11 U.S.C § 523(a)(5) (2002) (emphasis added).

The Complaint, however, alleges no debt *for alimony . . . maintenance . . . , or support*. Moreover, there is no basis in the record of this proceeding, including the exhibits offered by the Plaintiff, and admitted at Trial, *see, e.g.*, Exhibit 11 (excerpts from Separation Agreement dated October 2, 1997)², for a determination of nondischargeability pursuant to the provisions of Bankruptcy Code Section 523(a)(5).³ Consequently, on the present record the Plaintiff has not met his burden of proof⁴ as to Section 523(a)(5).

The Complaint also references Missaghi v. Lisa Delgatto, et al., CV-98-0148981S,

²Exhibit 11 consists of pages 1,7, 8,and 11 of a "Separation Agreement" dated October 2, 1997, bearing the purported signatures of the Plaintiff, the Debtor, and their respective counsel.

³With the possible exception of the following language in Exhibit 11 at page 1: "MEDICAL/HEALTH INSURANCE . . . The parties agree that they will be equally responsible for any un-reimbursed medical expenses for the minor child."

⁴The party opposing the bankruptcy discharge of a particular debt bears the burden of proving by a preponderance of the evidence that the requirements of Section 523(a)(5) have been met. *See Grogan v. Garner*, 498 U.S. 279 (1991); *In re Thirtyacre*, 36 F.3d 697 (7th Cir. 1994).

(a pending state court proceeding for “willful and malicious injury”), Complaint at ¶ 5, and cites to “11 U.S.C. section 523(a)(6)”, *Id.* at ¶ a, and, therefore, raises, *inter alia*, the issue of the dischargeability - under the standards of Bankruptcy Code Section 523(a)(6).⁵ Section 523(a)(6) excepts from a debtor’s discharge⁶ any debt for “willful and malicious injury by the debtor to another entity or to the property of another entity.” While neither “willful” and/or “malicious” conduct is defined by the Bankruptcy Code, the United States Supreme Court has clarified that Section 523(a)(6) renders non-dischargeable “only acts done with *actual intent to cause injury*”, not merely “acts, done intentionally, that cause injury”. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998) (emphasis added). There is no basis in the record of this proceeding, including the exhibits offered by the Plaintiff, and admitted at Trial, to support a finding that the Plaintiff suffered an injury inflicted by the Debtor acting with *actual intent to cause injury*. Consequently, on the present record the Plaintiff has not met his burden of proof as to Section 523(a)(6).

The Complaint also seeks relief in the form of a determination that certain “assets and funds are not to be included in the bankruptcy estate and . . . should be held aside for the exclusive claims of the Plaintiff”, Complaint at ¶ 7. As a basis for the Courts authority

⁵On the record as a whole it may be that the Plaintiff also seeks Section 523(a)(6) relief in connection with the Debtor’s alleged conduct in *Lisa Missaghi v. Kamyab Missaghi*, FA- 96-0133087S, the state court divorce proceeding. The Complaint, read liberally, alleges, *inter alia*, Debtor conduct – apparently in the divorce proceeding – with “willful and malicious intent [to injure the Plaintiff]”. Complaint ¶ 8. There is no evidence in the present record of this type of Debtor conduct.

⁶The Debtor received her Discharge on June 25, 2002. Doc. I. D. No. 44.

to act in connection with this request, the Plaintiff cites to “11 USC”.⁷ Complaint at ¶ 7. Title 11, United States Code, provides no authority permitting a bankruptcy court to order non-bankruptcy estate property to be held for the exclusive claims of any entity.

For these reasons, based upon the existing record, the Plaintiff is not entitled to any relief on the Complaint. However, upon review of the record, it appears to the Court that at the conclusion of the Trial proceedings of February 11, 2003, it took the matter under advisement without affording the Plaintiff a full and fair opportunity to present testimony, if desired, or additional documentary evidence, if any. In addition, the Court may have discouraged the Plaintiff from presenting additional evidence by an “assumption” that the Plaintiff was seeking only a default based upon the Debtor’s failure to appear.

Accordingly, for the purpose of permitting the Plaintiff opportunity to supplement the record by offering further evidence, testimonial or documentary, in support of his claims for relief in the Complaint, and in satisfaction of his burden of proof under Sections 523(a)(5) & (6), see footnote 4, infra:

IT IS HEREBY ORDERED that a supplemental hearing on the Complaint will be held at the United States Bankruptcy Court for the District of Connecticut, Connecticut Financial Center (18th Floor), 157 Church Street, New Haven, Connecticut on Monday, March 10, 2003 at 10:00 A.M. (hereafter, the “Supplemental Hearing”); and,

IT IS FURTHER ORDERED and **NOTICE TO THE DEBTOR AND THE PLAINTIFF IS HEREBY GIVEN** that at the Supplemental Hearing, in light of the Chapter 7 Trustee’s

⁷The Pre Trial Order, Doc. I. D. No. 25, and the Adversary Proceeding Cover Sheet filed with the Complaint, Doc. I.D. No. 1, reference only Sections 523(a)(5) & (6), and 523, of Title 11, respectively.

Report of No Distribution, Doc. I. D. No. 46, filed November 12, 2002 (Case No. 01-34774 (ASD)), reporting, *inter alia*, no assets for distribution in this bankruptcy estate, the Court will also consider the Plaintiff's oral Trial motion and request for authority to proceed in accordance with applicable state law in the Superior Court for the State of Connecticut, Judicial District of Waterbury in Lisa Missaghi v. Kamyab Missaghi, FA- 96-0133087S to seeking an award of certain personal property to the Plaintiff;⁸ and,

IT IS FURTHER ORDERED that the Clerk shall forthwith serve a copy of this Memorandum and Order on the Plaintiff and the Defendant.

BY THE COURT

⁸On May 2, 2002, the Court sustained the Chapter 7 Trustee's *Objection*, see Doc. I.D. Nos. 23 & 41, to the Plaintiff's *Second Amended Motion for Relief from Stay*, Doc. I.D. No. 17, seeking relief from the automatic stay of Section 362(a) to permit the state court in *Lisa Missaghi v. Kamyab Missaghi*, FA- 96-0133087S, "to divide personal property in the marital estate". The personal property at issue appears to include such items as "Dart Sets", "Children books", items of furniture, etc., see Exhibit 9.

The Debtor received her Bankruptcy Discharge on June 25, 2002. Doc. I. D. No. 44. Upon the entry of a discharge order, the automatic stay of § 362(a) is dissolved, and is replaced by the permanent injunction of § 524(a) which provides, in pertinent part:

A discharge in a case under this title —

(1) *voids any judgment* at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor *with respect to any debt discharged...*;

(2) *operates as an injunction against* the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset *any such debt* as a personal liability of the debtor....

11 U.S. C. 524(a)(1998)(emphasis added).

At the Trial the Plaintiff stated "[t]he reason I am here today is to ask the Court to put aside all the personal properties that was ordered by the family court to be taken care of after the divorce. * * * * [By the Debtor's filing of her bankruptcy petition] I am not able to claim any of this stuff, personal stuff, [that] was supposed to be divided." Record of 2/10/03 at 10:06:00 – 10:06:55.

DATED: February 11, 2003

Albert S. Dabrowski
United States Bankruptcy Judge

This adversary proceeding came on for trial on February 10, 2003. The Court received and reviewed the evidence⁹ adduced by the Plaintiff only, the Defendant having failed to appear for trial after due notice. Having now heard and evaluated the argument

⁹The parties are former husband and wife embroiled in long-standing state court disputes over the distribution of marital property. In the Complaint to Determine Dischargeability of Debts (hereafter, the "Complaint"), the Plaintiff-husband seeks a determination of nondischargeability of certain debts pursuant to Bankruptcy Code §§ 523(a)(5) and (6) in the Debtor-wife's Chapter 7 Bankruptcy case. In addition, the Complaint, which is by no means a model of clarity, further solicits resolution in the Plaintiff's favor of certain assets "pursuant to 11 USC". Code Section 523(a)(5) and (6) except from discharge under section 727, any debt -- (i) "to a spouse, former spouse, ... for alimony to, maintenance for, or support of such spouse ... in connection with a separation agreement, divorce decree or other order...." § 523(a)(5) (2001); and (ii) "for willful and malicious injury by the debtor to another entity or to the property of another entity." § 523(a)(6) (2001). According to *Grogan v. Garner*, 111 S. Ct. 654 (1991), the preponderance of the evidence standard applies to all § 523(a) dischargeability proceedings. Hence, the Plaintiff has the burden of proving all elements of his case by a preponderance of the evidence; which, in large measure, he failed to do on the face of the record before this Court. Plaintiff did not produce a divorce judgment from which the Court could divine his complete entitlement to relief under 523(a)(5). The copy of the separation agreement, entered into evidence as exhibit 11, is insufficient in this regard in that it bore no proof the document merged with the divorce decree which Plaintiff argued was rendered in 1997. Likewise, Plaintiff failed to demonstrate that the Defendant acted willfully and maliciously with respect to any rights, possessory or otherwise he has pursuant to 523(a)(6).

of the Plaintiff appearing *Pro se*¹⁰ and examined the documentary evidence presented; in accordance with which it is hereby

ORDERED that judgment shall enter in favor of the Plaintiff declaring that any non-dischargeable debts¹¹ owed to the Plaintiff by the Defendant ensuing from state court matrimonial judgments, and that are exempt from discharge pursuant to § 523(a)(5), are declared non-dischargeable in the instant bankruptcy case; and

IT IS FURTHER ORDERED that inasmuch as the Plaintiff has failed to carry his burden of proof with respect to § 523(a)(6) of the Bankruptcy Code, the requested relief is **DENIED** on the basis of the record before the Court; and

IT IS FURTHER ORDERED that with regard to the requested relief in the mischaracterized section “11 USC”, judgment shall be rendered against the Plaintiff as the Court is unable to determine the specific relief requested thereunder.

BY THE COURT

DATED: _____

Albert S. Dabrowski
United States Bankruptcy Judge

¹⁰Both the Plaintiff and Defendant entered *Pro se* appearances in this proceeding. The Complaint, however, was originally filed by counsel, Meryl Ann Spat, Esq., as counsel for the Plaintiff, and listed Frederick A. Dlugokecki, Esq., as counsel for the Defendant

¹¹The Plaintiff continues to pursue his state court remedies against the Defendant, who The Defendant procured an order of discharge of all dischargeable debts in her bankruptcy case on June 25, 2002, subsequent to leave granted the Chapter 7 trustee to file a Section 727 complaint objecting to the Debtor’s general discharge. The trustee sought and obtained

Plaintiff did not produce a divorce judgment from which the Court could divine his complete entitlement to relief under 523(a)(5). The copy of the separation agreement, entered into evidence as exhibit 11, is insufficient in this regard in that it bore no proof the document merged with the divorce decree which Plaintiff argued was rendered in 1997. Likewise, Plaintiff failed to demonstrate that the Defendant acted willfully and maliciously with respect to any rights, possessory or otherwise he has pursuant to 523(a)(6).

IT IS HEREBY ORDERED that judgment by default shall enter in favor of the Plaintiff, Kamy Missaghi (hereafter, the "Plaintiff"), such that any debt of the Debtor to the Plaintiff arising from the facts set out in the Complaint in this proceeding as determined, or to be determined, in any non-bankruptcy forum in accordance with applicable law, including, but not necessarily limited to the Superior Court for the State of Connecticut, Judicial District of Waterbury in Lisa Missaghi v. Kamyab Missaghi, FA- 96-0133087S and Missaghi v. Lisa Delgatto, et al., CV-98-0148981S, is **NOT DISCHARGED** in the Debtor's bankruptcy case (Case No. 01-34774 (ASD)) pursuant to 11 U.S.C. §§ 523(a)(5)¹² and (6)¹³; and,

IT IS FURTHER ORDERED that in light of the (i) the Chapter 7 Trustee's Report of No Distribution, Doc. I. D. No. 46, filed November 12, 2002 (Case No. 01-34774 (ASD)), reporting, *inter alia*, no assets for distribution in this bankruptcy estate, and this Court's lack of authority to order all other requests for relief in the Complaint are **DENIED**; and,

IT IS FURTHER ORDERED the Plaintiff may proceed in accordance with applicable state law to attempt to fix and liquidate the debts deemed nondischargeable herein.¹⁴

¹²

However, in light of the default nature of this Judgment, whether the plaintiff could have established all the requisite elements of Section 523(a)(5) is of no consequence.

¹³Bankruptcy Code Section 523(a)(6) *Missaghi v. Lisa Delgatto, et al.*, CV-98-0148981S, alleges, *inter alia*, wilful and malicious injury by the Debtor.

¹⁴The Debtor received her Discharge on June 25, 2002. Doc. I. D. No. 44. Upon the entry of a discharge order, the automatic stay of § 362(a) is dissolved and is replaced by the permanent injunction of § 524(a) which provides, in pertinent part:

A discharge in a case under this title —

(1) *voids any judgment* at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor *with respect to any debt discharged*...;

(2) *operates as an injunction against* the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset *any such debt* as a personal liability of the debtor....

“assets and funds . . . not included in the bankruptcy estate . . . to be held for the exclusive claims of the Plaintiff”,¹⁵ Complaint at ¶ 7, add footnote noting the Plaintiff’s assertion that he was only there to seek personal property. and pin him to prosecuting the Complaint.

11 U.S. C. 524(a)(1998)(emphasis added).

¹⁵As a basis for the Courts authority to act in connection with this request, the Plaintiff cited to “ 11 USC”. Complaint at ¶ 7. title 11, United States Code, provides no authority permitting a bankruptcy court to order non-bankruptcy estate property to be held for the exclusive claims of any entity.